BEFORE THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

dPi TELECONNECT, L.L.C.	)	
	)	
v.	)	**DOCKET NO. 2008-160-C**
	)	
BELLSOUTH	)	
TELECOMMUNICATIONS, INC.	)	

REBUTTAL TESTIMONY OF TOM O'ROARK

Q. Please tell us who you are and give a little background about yourself.

A. My name is Tom O'Roark. I serve as dPi's CFO and, for now, chief executive officer. Since the departure of dPi's Brian Bolinger, dPi's former vice president of legal and regulatory affairs, I am the one who has taken the lead in dealing with disputes over promotion credits with AT&T. Prior to my involvement, Brian Bolinger along with Steve Watson of Lost Key Telecom Inc. (which functions as dPi's billing and collections agent for promotions) headed up this effort on behalf of dPi, and thus had most of the detailed interaction with AT&T; I was simply kept appraised of events as they developed by Brian and/or Steve.

Q. Mr. O'Roark, have you reviewed BellSouth's direct testimony?

A: I have.

Q: Overall, what is your response to BellSouth's testimony?

A: The main ideas that bear addressing are the following: (1) BellSouth's contention that it is not required to provide the cash back offers to dPi because they are not telecommunications services; (2) its contention that dPi missed a deadline

for seeking the correct pricing; and (3) that allowing AT&T to discriminate by making offers available to its retail customer but not to CLECs like dPi does not harm competition.

Q: What is your response to BellSouth's contention that it need not offer the cash back promotions to CLECs like dPi because they are not telecommunications services?

A. This is a classic case of misstating the problem. The question is not whether the promotions are telecommunications services – the question is whether the promotions affect ***the rate*** at which the services are provided.[1] These cash back promotion offers, whether in the form of rebates on a bill or actual checks sent to consumers, have the obvious effect of offering to reduce the net amount spent by the consumer on telephone service. The fact that the customer might initially be billed one amount and the next day credited or paid back with a check doesn't change the fact that the net amount of the overall retail offer is much less than the tariffed rate. Allowing AT&T to shift their customers to this kind of non-standard offering and thereby circumvent AT&T's obligation to resell their services at wholesale is precisely the kind of activity that the FCC warned eviscerates the resale provisions of the FTA.

The FCC has discussed promotion issues at length in various dockets,

[1] 47 U.S.C. § 251(c)(4)(A). ILECs have the duty to "offer for resale at wholesale ***rates*** any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers."

notably including the FCC's 1996 *Local Competition Order*.[2] In the *Local Competition Order*, the FCC explained

> [t]he ability of [I]LECs to impose resale restrictions and conditions is likely to be evidence of market power and may reflect an attempt by [I]LECTs to preserve their market position. In a competitive market, an individual seller (an [I]LEC) would not be able to impose significant restrictions and conditions on buyers because such buyers turn to other sellers. Recognizing that [I]LECs possess market power, Congress prohibited unreasonable restrictions and conditions on resale. *Local Competition Order*, 11 FCC Rcd at 15966, ¶939.

Indeed, in the *Local Competition Order* the Commission expressly recognizes that ILECs could use promotions like AT&T's to manipulate their retail rates and effectively avoid their resale obligations. Consequently, the Commission found that the resale requirement of Section 251(c)(4) of the Act

> ***makes no exception for promotional or discounted offerings***, including contract and other customer-specific offerings. We therefore conclude that no basis exists for creating a general exemption from the wholesale requirement for all promotional or discount service offerings made by incumbent LECs. A contrary result would permit incumbent LECs to avoid the statutory resale obligation by shifting their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act. *Local Competition Order*, 11 FCC Rcd at 15970, ¶948 (footnote omitted)(emphasis added).

The FCC concluded that resale restrictions are presumptively unreasonable and that an ILEC can rebut that presumption but only if the restrictions are "narrowly tailored." *Local Competition Order*, 11 FCC Rcd at 15966, ¶939.

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[2] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15954, ¶907 (rel. Aug. 8, 1996) ("*Local Competition Order*").

Accordingly, in the *Arkansas Preemption Order*, the FCC preempted an Arkansas statute that was contrary to the Commission's implementation of Section 251(c)(4)(B), stating:

> In connection with offering to competing carriers a retail service that an incumbent LEC markets to its end-user consumers at a promotional price for longer than 90 days, the second sentence of 9(d) allows the incumbent LEC to apply the wholesale discount to the ordinary retail rate, whereas ***our rules require the incumbent LEC to apply the wholesale discount to the special reduced rate***.[3]

Finally, the rules which the Commission adopted in the *Local Competition Order* plainly state that all promotional offerings must be made available for resale, other than those promotions expressly provided for in Section 51.613 (cross-class and short term promotions), and that ILECs are prohibited from restricting, limiting or refusing in the first instance to make telecommunications service available for resale. The FCC rules on resale are found in the Code of Federal Regulations ("CFR") at Title 47 (Telecommunication), Part 51 (Interconnection), Subpart G (Resale), sections 51.601 - 51.617. In relevant part, the FCC rules provide:

47 CFR § 51.605 Additional obligations of incumbent local exchange carriers.

(a) An incumbent LEC shall ***OFFER*** **to any requesting telecommunications carrier any telecommunications service that the incumbent LE*C*** ***OFFERS*** **on a retail basis** to subscribers that are not telecommunications carriers for resale **at wholesale rates** ....

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[3] *In the Matter of Petitions for Expedited Declaratory Ruling Preempting Arkansas Telecommunications Regulatory Reform Act of 1997 Pursuant to Sections 251, 252, and 253 of the Communications Act of 1934, as amended,* Memorandum Opinion and Order, 14 FCC Rcd 21579, ¶47 (rel. Dec. 23, 1999) ("*Arkansas Preemption Order*")(footnotes omitted)(emphasis added).

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(e) Except as provided in §51.613, ***an incumbent LEC shall not impose restrictions on*** the ***resale*** by a requesting carrier of telecommunications services offered by the incumbent LEC.

47 C.F.R. § 51.613 Restrictions on resale.

(a) Notwithstanding §51.605(b), the following types of restrictions on resale may be imposed:

> (1) Cross-class selling. [an ILEC may prohibit CLECs from reselling a promotion to customers at large if the ILEC makes the promotion available only to a certain class of customers – i.e., if the ILEC's promotion is directed to residential customers, the CLEC cannot cross sell it to business class customers.]
>
> (2) Short term promotions. An incumbent LEC shall apply the wholesale discount to the ordinary rate for a retail service rather than a special promotional rate only if:
>
> > (i) Such promotions involve rates that will be in effect for no more than 90 days; and
> >
> > (ii) The incumbent LEC does not use such promotional offerings to evade the wholesale rate obligation, for example by making available a sequential series of 90-day promotional rates.

(b) **With respect to any restrictions on resale not permitted under paragraph (a), an incumbent LEC may impose a restriction *only if it proves to the state commission that the restriction is reasonable and nondiscriminatory***.

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I have added the emphasis placed on the relevant language cited above.

Q. What does the contract between AT&T and dPi say? Something different from federal law?

A. No. Actually, the contract clearly states that it is subject to state and federal law, and that AT&T will make available to resellers like dPi the same services

AT&T offers at retail. Among other things, the parties' contract provides in relevant part the following:

-- That the parties wish to interconnect "pursuant to Sections 251 and 252 of the Act" GTC p.1;

-- Parity: "When DPI purchases Telecommunications Services from BellSouth pursuant to ... this Agreement for the purposes of resale to End Users, such services shall be be ... subject to the same conditions... that BellSouth provides to its ...End Users." GTC p. 3

-- Governing Law: "... ***this agreement shall be governed by and construed in accordance with federal and state substantive telecommunications law, including rules and regulations of the FCC***...." GTC p. 15.

-- Resale Attachment's General Provision sections 3.1: p. 4: "...***Subject to effective and applicable FCC and Commission rules*** and orders, *BellSouth shall make available to DPI for resale those telecommunications services BellSouth makes available...to customers* who are not telecommunications carriers."

Q: What is your response to BellSouth's contention competition is not harmed when AT&T does not make the cash back promotions available to CLECs like dPi?

A. I find it absolutely astonishing that AT&T makes such claims. Among other things, AT&T appears to be claiming that its discriminatory actions are good for competition, and that its actions have had no effect adverse effect competition, citing as evidence:

(1) the fact that the amounts in South Carolina are so small;

(2) the fact that dPi is still in business; and

(3)the fact that other CLECs have not complained as dPi has done.

First, the point behind the FTA was to help dismantle the monopoly in local phone service enjoyed by BellSouth and the other ILECs by promoting competition

with the ILECs by new entrants – not to promote *BellSouth*'s ability to compete against new entrants.

I'm sure this Commission is well aware that wireline competition in South Carolina is not robust, vibrant, or even healthy. The line count that CLECs have is minuscule compared to BellSouth's and is not growing. All the former chief wireline competitors have been crushed: AT&T, once an independent competitor, has been consumed by BellSouth/AT&T; MCI is likewise long gone.

Second, all the things AT&T is citing as evidence that its discriminatory treatment with regards to these promotions did not harm competition are in fact evidence to the contrary:

(1) the fact that the amount in controversy is so low is because dPi had trouble attracting enough customers that might otherwise qualify for the promotions – there is simply no way for dPi to compete with AT&T when AT&T's effective retail rate is so much lower than the wholesale price dPi is charged for the same service;

(2) the fact that dPi is still alive does not mean that dPi is successful or that competition is flourishing: dPi has in fact had difficulty growing its line count and is lucky to be alive at all; the fact that dPi limps along despite its wounds does not mean that it is "successful." dPi's line count is infinitesimal as compared to BellSouth's in South Carolina and can hardly be called an example of "success."

(3) the fact that now that the old independent AT&T and MCI are gone and the remaining small CLECs no longer have the resources to engage in unlimited

litigation with AT&T is not a measure of the CLECs' successful competition, but an indication that in more than 10 years of nearly non-stop litigation by the ILECs since the Act was passed, the ILECs have managed to bleed the competition dry.

Allowing AT&T to get away with offering its services at retail at an effective rate lower than the wholesale rate is a sure recipe for the eventual elimination of wireline competition entirely.

Q. What is your response to AT&T's claim that dPi's claims were made late under the contract?

A. Ms. Moreland, whose testimony has been replaced in other states with the substantially similar testimony of Mr. Ferguson, suggests that claims that were filed more than 12 months after they arose are barred by the contract. This is incorrect; the contract in effect at the time these orders were processed had a ***six year*** limitations period.

More particularly, from 2003 to the present, dPi and AT&T operated under two nearly identical interconnection agreements. The first was in effect from 2003 to May 2007, and is found in the record as Exhibit EMM-1 to AT&T witness' Moreland's testimony. The second was in effect from May 2007 to the present, and is found in the record at as Exhibit EMM-2 to AT&T witness' Moreland's testimony.

The orders in dispute, for which dPi was overcharged, were provided from 2003 to June 2007 (after June 2007, AT&T began extending the cash back promotions to dPi.) Thus, the key contract for the purposes of this dispute is the

first contract, in effect from 2003 to May 2007, found in the record as Exhibit EMM-1. This contract in effect from 2003 to May 2007 provides at Section 18 of its Terms and Conditions that the Agreement will be governed federal and state substantive telecommunications law, but in all other respects the "Agreement shall be governed by and construed and enforced in accordance with the laws of the State of Georgia without regard to its conflict of laws principles." In Georgia, the limitations period for a breach of contract is six years. O.C.G.A. section 9-3-24. Since the earliest bill date at issue in this case is from November 2003, this case was filed well within the limitations period.

The second contract, which went into effect May 2007, does have a 12 month limitations period in it. However, this second contract specifically provides that ***"the rates, terms, and conditions of this Agreement shall not be applied retroactively prior to the Effective Date."*** General Terms and Conditions sec. 2.1.[4]

The second agreement also has a "merger clause" at section 30.1 that provides that orders placed under the prior agreement but not filled until the effective date of the new agreement, and services commenced under prior agreements but provided under the new agreement would be governed by the new agreement going forward. The purpose of that language is to explain how orders and services will be handled on a going forward basis, after the new contract goes

[4] The "Effective Date is defined as the date that the Agreement is effective for purposes of rates, terms, and conditions and shall be 30 days after the [April 2007] date of the last signature executing the Agreement." General Terms and Conditions, Definitions (p. 2).

into effect. Obviously, the fact that there is a new contract replacing the old one doesn't mean the parties will stop all operations and then re-start them under the new contract (e.g., there was no disconnection of customers when the old contract expired, and re-connection after the new effective date); the transition was meant to be seamless as far as daily operations go: orders that had been submitted but not filled prior to the effective date of the new contract did not have to be cancelled and ***re-submitted*** to be filled under the new contract. Instead, this provision is intended to confirm that services commenced or ordered under the earlier contract, but filled or provided after the new contract goes into effect, are governed by the new contract.

However, this provision from the merger clause in the second agreement does not apply to orders and service that were ***completed under the old contract***: orders and services that were completed under the old contract do not get re-billed to conform to pricing changes and other changes in the new contract. This is made clear by General Terms and Conditions sec. 2.1 which specifically provides that ***"the rates, terms, and conditions of this Agreement shall not be applied retroactively prior to the Effective Date."*** Therefore this provision has no impact on the deadline for dPi to bring this claim, as the vast majority of services had been fully completed as of the effective date of the 2007 ICA. The claims arising out of the services which were not fully completed and which are subject to the provisions of the 2007 ICA were brought within 12 months as required by the 2007 ICA.

Furthermore, neither version of the contracts themselves provide for specific

forms to be used in disputing bills or escalating disputes; AT&T cannot arbitrarily impose its own conditions on what form is "acceptable" for billing after the contract has been signed. The requests for credits were submitted on AT&T's "BAR" (Billing Adjustment Request) forms, and when not paid, the matter was escalated by dPi's Brian Bolinger discussing the matter with AT&T's Pam Tipton.

Q. Has dPi nonetheless waived its right to recover the overpayments that BellSouth extracted?

A. No. I'm not sure how this could ever be plausibly argued. The contract clearly provides at General Terms and Conditions section 17 (16 in the later contract) that "A failure or delay of either Party to enforce any of the provisions... or to require performance of any of the provisions hereof shall in no way be construed to be a waiver of such provisions...."

Even if AT&T were to make some sort of equitable argument, i.e., that dPi has "taken too long" to bring these claims, AT&T cannot rely on principles of equity to protect it in this case because AT&T has unclean hands. The conduct which BellSouth seeks to protect is its own inequitable conduct of overcharging dPi for the services at issue. To allow BellSouth to retain these funds would result in its unjust enrichment at the expense of dPi.

Q. Could you please elaborate on what you mean by BellSouth's "inequitable conduct of overcharging dPi"?

A. To understand the dispute, one must understand its origins – namely, AT&T's "promotion process" which, at the time relevant to this case, operated in practice if not by design to enrich AT&T as the expense of its small competitors.

At the times relevant to this complaint, AT&T was supposedly "unable" to bill resellers the correct amount (including promotional discounts) for the services they ordered when the order was submitted. However, it was able to bill its ***retail*** customers correctly.

Also, AT&T/SBC's systems in the midwest and southwest ***do*** allow one to apply for a promotional credit as a part of the provisioning order, and reject the order if it does not qualify for the promotion. The credit is applied to the price immediately and the discount reflected on the same bill; the CLEC pays no more than what it actually owes for the service from the beginning. So there is no technical reason why CLECs cannot be billed correctly for the service the acquire from AT&T.

Nevertheless, in the former BellSouth regions AT&T ***automatically overcharges*** every reseller for every service the reseller orders that is subject to a promotional discount. Then AT&T shifts the burden on to the reseller to (1) figure out how much AT&T has overcharged the reseller, and (2) dispute AT&T's bills accordingly. If a CLEC is not aware that this is how the system is supposed to work and does not know to apply for these promotions, AT&T retains their money.

For those CLECs who generally understand that they must apply for these credits, AT&T's system makes it as difficult as possible for the reseller to dispute the bills to AT&T's satisfaction. First, the credit request must be meticulously documented, listing details of every order for which credit is requested. But getting the data to populate these forms is a Herculean task in itself: it must come from

AT&T's billing and ordering data, which AT&T has traditionally provided to resellers only on either a paper bill, or electronically in a "DAB" file, which has data locks built into it, making downloading of the raw data exceptionally difficult. To make matters worse, in dPi's experience next to no one at AT&T can explain how to get the data out of the "DAB" files, because AT&T does not maintain its own data in such files, and its employees simply are not equipped with the knowledge to answer questions about how to unlock its secrets. Figuring out how, as a practical matter, to apply for these credits takes a large amount of resources in time and money. Some CLECs appear to have simply thrown their hands in the air and given up.

Next, if a CLEC spends the time and resources to figure out a way to get at their data, and create systems for electronically scouring it to identify those orders that ought to qualify for promotional credits, and write and re-write programs that will populate AT&T's forms (which it changes from time to time as it sees fit), AT&T will examine the requests for credit to see if it will honor them. There is no deadline for AT&T to act on these credit requests. When it finally approves or denies credits – which can take months – it makes no explanation for what credit requests it accepts, and what credits it rejects, and why. Thus, if the credit request is rejected, the CLEC has no way of auditing the rejection to see if it is merited or not. But note that even if the credit is accepted, AT&T has kept the CLEC's money for months, without interest, before returning it.

The system is backwards, failure prone, and grossly inefficient. And at every

step of the way, whether consciously designed to that end or not, the system works to enrich AT&T at the CLEC's expense.

Q. Does this conclude your rebuttal testimony?

A. Yes, it does for now. But I reserve the right to make changes as necessary.